

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

JERMAINE MERRELL HOLLIE,

Petitioner,

vs.

GARY SWARTHOUT, Warden,

Respondent.

No. C 12-0417 PJH (PR)

**ORDER FOR RESPONDENT
TO SHOW CAUSE**

Petitioner, a California prisoner currently incarcerated at California State Prison-Solano in Vacaville, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the filing fee.

Petitioner was convicted in San Mateo County, which is in this district, so venue is proper here. See 28 U.S.C. § 2241(d).

BACKGROUND

In 2008 petitioner was convicted of rape, see Cal. Penal Code § 261(a)(2), and sexual penetration with a foreign object, see *id.* § 289(a)(1). *People v. Hollie*, 180 Cal. App. 4th 1262, 1265 (2010). He was sentenced to a term of ten years in state prison. *Id.* He says he has exhausted the claims he raises here by way of a state habeas petition.

DISCUSSION

A. Standard of Review

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21 (1975). Habeas corpus petitions must meet

heightened pleading requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An application for a federal writ of habeas corpus filed by a prisoner who is in state custody pursuant to a judgment of a state court must “specify all the grounds for relief available to the petitioner ... [and] state the facts supporting each ground.” Rule 2(c) of the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. “[N]otice’ pleading is not sufficient, for the petition is expected to state facts that point to a ‘real possibility of constitutional error.’” Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir. 1970)). “Habeas petitions which appear on their face to be legally insufficient are subject to summary dismissal.” *Calderon v. United States Dist. Court (Nicolaus)*, 98 F.3d 1102, 1108 (9th Cir. 1996) (Schroeder, J., concurring).

B. Legal Claims

As grounds for federal habeas relief, petitioner asserts that: (1) His trial counsel was ineffective by not knowing his client’s possible maximum exposure; (2) trial counsel was ineffective in failing to present witnesses to support the consent defense; (3) trial counsel was ineffective in failing to seek proper instructions on police loss of evidence; and (4) the lack of a preliminary hearing on the DNA evidence and the state’s changed position on appeal were violations of due process. These claims are sufficient to require a response.

CONCLUSION

1. The clerk shall serve by regular mail a copy of this order and the petition and all attachments thereto on respondent and his attorney, the Attorney General of the State of California. The clerk also shall serve a copy of this order on petitioner.

2. Respondent shall file with the court and serve on petitioner, within fifty-six (56) days of the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted. Respondent shall file with the answer and serve on petitioner a copy of all portions of the state trial record that have been transcribed previously and that are relevant to a determination of the issues presented by the petition.

If petitioner wishes to respond to the answer, he shall do so by filing a traverse with

1 the court and serving it on respondent within twenty-eight days of his receipt of the answer.

2 3. Respondent may file a motion to dismiss on procedural grounds in lieu of an
3 answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing
4 Section 2254 Cases. If respondent files such a motion, it is due fifty-six (56) days from the
5 date this order is entered. If a motion is filed, petitioner shall file with the court and serve
6 on respondent an opposition or statement of non-opposition within twenty-eight (28) days of
7 receipt of the motion, and respondent shall file with the court and serve on petitioner a reply
8 within fourteen days of receipt of any opposition.

9 4. Petitioner is reminded that all communications with the court must be served on
10 respondent by mailing a true copy of the document to respondent's counsel. Petitioner
11 must keep the court informed of any change of address and must comply with the court's
12 orders in a timely fashion. Failure to do so may result in the dismissal of this action for
13 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). *See Martinez v.*
14 *Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

15 **IT IS SO ORDERED.**

16 Dated: October 26, 2012.



PHYLLIS J. HAMILTON
United States District Judge

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